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NO. 83-67

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

DANIEL INGLE,

Petitioner,

vs.

STATE OF ARKANSAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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Q.C.-84-7127 45 COPIES

QUESTIONS PRESENTED

I.

WHETHER PETITIONER'S FOURTH AMENDMENT RIGHTS WERE VIOLATED BY AN OPEN FIELD SEARCH AND SEIZURE OF MARIJUANA?

II.

WHETHER PETITIONER'S FIFTH AMENDMENT RIGHTS WERE VIOLATED BY NON-CUSTODIAL INVESTIGATORY QUESTIONING BY THE POLICE?

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The opinion of the Arkansas Court of Appeals is reported at 8 Ark. App. 218 (May 18, 1983). A copy of the opinion is included in petitioner's appendix.

JURISDICTION

Respondent agrees that this Court has discretionary jurisdiction to review this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner has included the text of Amendments 4, 5 and 14 to the United States Constitution which are the only constitutional provisions applicable to his petition.

ARKANSAS RULES OF CRIMINAL PROCEDURE

RULE 13.2 Contents of Search Warrant.

(a) A search warrant shall be dated, issued in duplicate, and shall be addressed to any officer.

(b) The warrant shall state, or describe with particularity:

(i) the identity of the issuing judicial officer and the date and place where application for the warrant was made;

(ii) the judicial officer's finding of reasonable cause for issuance of the warrant;

(iii) the identity of the person to be searched, and the location and designation of the places to be searched;

(iv) the persons or things constituting the object of the search and authorized to be seized; and

(v) the period of time, not to exceed five (5) days after execution of the warrant, within which the warrant is to be returned to the issuing judicial officer.

Rule 14.2 Search of Open Lands.

An officer may, without a search warrant, search open lands and seize things which he reasonably believes subject to seizure.

STATEMENT OF THE CASE

Petitioner was charged by information with the manufacture of a controlled substance (marijuana) and possession with intent to deliver a controlled substance, in violation of Ark. Stat. Ann. §82-2617 (Repl. 1976).

Petitioner moved to suppress evidence seized in an open field search and statements made before and after his arrest. A hearing was held on this motion and relief was denied.

A hearing was held on the suppression motions with the State presenting testimony from three officers of the Arkansas State Police. Petitioner did not testify or call on any witnesses in his behalf. The record does *not* reflect that

> [T]he State Police received information from a citizen who had been there that petitioner was growing marijuana on his land. The citizen requested that a search not be made until later lest his identification become known to petitioner. Subsequently, the State Police confirmed the location of the land at the Scott County Assessor's Office and who owned it.

Petitioner's Brief at page 3.

The record reflects only that information was received that marijuana was being grown in Scott County, that two officers were assigned to investigate this information and that some records were checked at the Assessor's Office before the officer physically tried to locate the marijuana. (T. 48, 78) There was no prior identification of the specific location of the land or of its ownership.

Appellant was tried before a jury and convicted on both counts. He was sentenced to five years for manufacture and seven years for possession with intent to deliver. The trial court suspended two of the seven years and ordered the sentences to run concurrently.

On appeal to the Arkansas Court of Appeals, petitioner raised the two issues which he now presents to this Court. The Arkansas Court of Appeals found the issue to be without merit and unanimouly affirmed the trial court's judgment. It is from this judgment that petitioner brings his petition for a writ of certiorari.

ARGUMENT

I.

PETITIONER DID NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN AN OPEN FIELD UPON WHICH MARIJUANA WAS DISCOVERED AND SEIZED.

Petitioner contends that marijuana was illegally seized without a warrant from an area in which he had a reasonable expectation of privacy. Petitioner did not present any evidence at the suppression hearing and at trial testified that he had nothing to do with the marijuana being grown in the field which *may* have been on his land. (T. 253-254) Without a proprietary interest, petitioner has no standing to challenge the search. *United States v. Salvucci*, 448 U.S. 83 (1980); *Rakas v. Illinois*, 439 U.S. 128 (1978).

Appellee submits that this issue is controlled by *Smith v. Maryland*, 442 U.S. 735 (1979) and *Hester v. United States*, 265 U.S. 57 (1924) and that the record supports that the field in question was an open field in which petitioner had no reasonable expectation of privacy.

Testimony at the suppression hearing established that officers traveled down an open road in a wooded area until they came upon some large rocks and a metal tub obstructing their way. (T. 82-83) Officer Ron Lewis of the Arkansas State Police testified that they exited the vehicle and observed a subject in the road some fifteen to twenty yards away. (T. 83-84) Officer Lewis approached this subject and then saw a yellow object some twenty yards down the same road. (T. 85-86) Upon reaching the yellow tent, he observed the tops of marijuana plants and some ten yards further found a clearing with a large number of marijuana plants.

(T. 87-88) The officers did not cross any fences, open any gates or observe any houses in this area. (T. 85-86) There were no signs posted.

The State Police had been informed that marijuana was being grown somewhere in the area and had assigned two officers to try to physically locate it. (T. 76-77) There was no testimony at the hearing which indicated that the land was connected with the appellant as is stated in his brief, nor was there any testimony that the exact location of the marijuana field was known previously. If a search warrant had been sought at this point there would have been great difficulty in describing with particularity the place to be searched as is required by Ark. R. Crim. P. 13.2 (b) (iii). Such difficulty in rural settings has been recognized in *Gatlin v. State*, 262 Ark. 485, 559 S.W.2d 12 (1977). Once the discovery was made on open land, down a road accessible to the public, there was no requirement that they then seek a warrant.

In *State v. Osborn*, 263 Ark. 554, 566 S.W.2d 139 (1978), the Arkansas Supreme Court adopted the standard of review applicable to issues concerning the suppression of evidence obtained by warrantless searches. As such issues present mixed questions of law and fact, deference will be given to the trial court's judgment and reversal will only result where the trial court's ruling is clearly against the preponderance of the evidence. Such is not the case at bar where the evidence clearly supports the court's ruling.

In interpreting the Arkansas Supreme Court's prior holdings in this area, the Arkansas Court of Appeals held in *Gustafson v. State*, 267 Ark. 830, 833, 593 S.W.2d 187 (Ark. App. 1979):

A search warrant of open land without a warrant is permissible. *Hester v. United States*, 265 U.S. 57 (1924); Rules of Criminal Procedure, 14.2 (1976). The Arkansas Court held that wooded areas are open land, *Bedell v. State*, 257 Ark. 895, 521 S.W.2d 200 (1975); even when the land in question belonged to the appellant, *Wyss v. State*, 262 Ark. 502, 558 S.W.2d 141 (1977).

In *Gaylord v. State*, 1 Ark. App. 106, 613 S.W.2d 409 (1981), the Arkansas Court of Appeals followed *Hester v. United States, supra*, in determining the test applicable to open field searches which is whether a defendant exhibits a reasonable expectation of privacy in the area of the search and seizure. In affirming the instant case, the Court followed both *Gaylord* and *Smith v. Maryland, supra*, which enunciated two questions applicable to Fourth Amendment protection; first, "whether the individual, by his conduct has 'exhibited an actual (subjective) expectation of privacy' ", and second, "whether the individual's subjective expectation is 'one that society is prepared to recognize as reasonable.' "

The record reflects no conduct on the part of the petitioner which exhibits any expectation of privacy. The only obstruction encountered by the officers were some large rocks and a washtub in the road. There is no testimony which establishes whether the obstacles were placed in the road or who might have placed them there. Certainly such obstacles are not what "society is prepared to recognize as reasonable." Otherwise, "the marijuana was found in plain view on open land down a road accessible to the public." 8 Ark. App. at 221.

Respondent submits that the Arkansas Court of Appeals correctly applied the Fourth Amendment pre-

cedents in *Hester* and *Smith* in determining that petitioner did not have a reasonable expectation of privacy in open accessible land.

II.

PETITIONER'S FIFTH AMENDMENT RIGHTS WERE NOT VIOLATED BY AN INVESTIGATORY QUESTION POSED BY THE POLICE IN NON-CUSTODIAL CIRCUMSTANCES.

Petitioner contends that his response to a question about who owned the property across the creek from his residence should have been suppressed as a violation of *Miranda v. Arizona*, 387 U.S. 436 (1966) as he was not advised of his rights prior to the question being asked. Respondent submits that the petitioner was not in custody at the time this question was asked, nor had the investigation reached the accusatory stage which would require that the officers advise the petitioner of his rights prior to asking any questions.

Petitioner again refers to facts without citation to the record and which respondent states are not present in the record, namely that an informant told police that marijuana was grown on appellant's land and that the ownership of the land was confirmed at the Assessor's Office.

Doug Stephens testified at the hearing that he had received some information that marijuana was being grown in Scott County (T. 48) and that some checking on the location was done at the Assessor's office. (T. 77) No reference was made to petitioner in this information. Officer Ron Lewis testified that after the field was discovered he followed an irrigation hose to Weaver Creek

where he observed a pump on the far side of the creek. (T. 89) Lewis and Trooper Westerman then walked back to Little Texas Road, over the bridge, back to the pump and followed an electrical cord to petitioner's residence. (T. 91-92) The sheriff arrived and supplied Lewis with the resident's name, not the name of the owner of the marijuana field as contended by petitioner. Lewis made contact with petitioner at his residence, explained who he was and that he was investigating marijuana growing across the creek. (T. 93-94) Lewis inquired who owned that property and when told that petitioner owned it, he placed him under arrest and read him his rights. (T. 94)

Petitioner alleges that he should have been read his rights prior to the question about the ownership of the property, relying on *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Reeves v. State*, 258 Ark. 788, 528 S.W.2d 924 (1979).

The United States Supreme Court in *Beckwith v. United States*, 425 U.S. 341 (1976), specifically rejected the argument that *Miranda* warnings should be required whenever an investigation has focused upon a defendant. 425 U.S. at 345-346. Where a suspect is not in custody and there are no circumstances indicating that an individual's will might be overborne by police conduct, the rationale of the exclusionary rule does not support an extension of *Miranda*. In *Beckwith*, IRS agents were interrogating a defendant in his home and he had been told of the criminal implications of their investigation. There was no indication that he was not free to leave or to tell the agents to leave.

In *Lacy v. State*, 271 Ark. 336, 609 S.W.2d 13 (1980), the Arkansas Supreme Court held that spontaneous remarks by a defendant did not require *Miranda* warnings. *Reeves v.*

State, supra, upon which petitioner relies, was distinguished in *Lacy* as involving a question of whether appellant was "in custody", rather than a question of whether he was being interrogated. The importance of being "in custody" was recognized by the trial court in the instant case. (T. 136) The question of whether a person is in custody is crucial in determining whether police conduct has shifted from an investigatory to an accusatory stage. When a suspect is in custody, the purpose of further questioning may be to elicit a confession and at that point *Miranda* warnings are necessary. *See Escobedo v. Illinois,* 378 U.S. 478 (1964).

In the case at bar, petitioner was not in custody. In *Reeves,* officers would not let the defendant leave or get out of their sight. Officers tried to put the defendant into a police car. Clearly, the defendant in that case was subject to police restraint. *Reeves* relies on *Orozco v. Texas,* 394 U.S. 324 (1969), another case in which there was testimony that a defendant was subject to some restraint and was "in custody" for *Miranda* purposes.

In the instant case, petitioner was not subject to any police restraint whatsoever. The ownership of the property was information which which would have inevitably been discovered by other means. Petitioner's admission of ownership was not a confession to having planted the marijuana. In fact, he denied having had anything to do with its cultivation at trial. (T. 253)

The officer did not have probable cause for an arrest based only on the electrical cord being traced to his residence. There were three homes at this site, not all the

occupants were responsible for the marijuana. It was the information that this occupant was also the landowner that gave the officer probable cause to arrest and at this point, the officer very properly advised the appellant of his rights.

Respondent submits that petitioner was not deprived of his freedom in any way when the investigating officer asked a routine question as to the ownership of the land. Therefore, *Miranda* does not preclude the admission of this statement as petitioner was not "in custody" and the case was still in an investigatory stage.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on writ of certiorari will only be granted when there are special and important reasons therefor. Subsection (c) provides that such writs will be granted when a state court has decided a federal question in a way which conflicts with applicable decisions of this Court or if it has decided an important question of federal law which has not been, but should be, settled by this Court.

Although respondent recognizes that review of writ of certiorari is discretionary, and that the Court is not bound by the guidelines of Rule 17.1(c), it respectfully submits that the Arkansas Supreme Court has followed the applicable decisions of this Court and has properly denied petitioner relief in his direct appeal.

Therefore, for these reasons, and for the reasons and authorities cited in respondent's brief in opposition to the

petition for writ of certiorari, respondent respectfully prays that this Court deny review on writ of certiorari.

Respectfully submitted,

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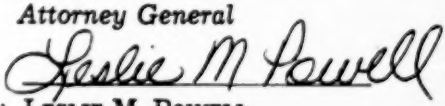

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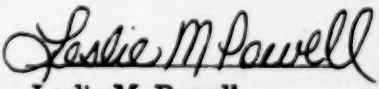
CERTIFICATE OF SERVICE

I, Leslie M. Powell, Assistant Attorney General, do hereby certify that I have served a copy of the foregoing brief for Respondent in Opposition To Petition, by mailing a copy of same by U.S. Mail, postage prepaid, to Mr. Robert S. Blatt, P.O. Box 1825, Fort Smith, Arkansas 72902, attorney of record for petitioner, this 13th day of October, 1983.



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